OMEGA SECURITIES SDN BHD

v.

YEO LEE HOE

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[CIVIL SUIT NO: S1-22-694-1999]
28 NOVEMBER 2002

COMPANY LAW: *Winding-up - Recovery of property - Company presented with petition for winding-up - Appointment of provisional liquidators - Refusal of company director to return company property and transfer club membership to company's name - Whether property and club membership constituted a valid and perfect gift from plaintiff to defendant - Whether transfer of said items subject to approval in general meeting - Whether transaction within ambit of s. 132E of Companies Act 1965*

The defendant was a director of the plaintiff and its holding company. He resided in a house which was registered in the plaintiff's name. The plaintiff also provided the defendant with a club membership, registered in his name, at the Kelab Sultan Abdul Aziz Shah. Subsequently, at the plaintiff's board of directors' meeting, it was decided that an EGM be convened at a later date to consider giving the property and the club membership to the defendant as gratuities, subject to the approval of the Kuala Lumpur Stock Exchange ('KLSE') and the plaintiff's shareholders in consideration for his dedication and past services.

Subsequently, a winding-up petition was presented against the plaintiff by the KLSE. Provisional liquidators, appointed by the High Court to act on behalf of the plaintiff, informed the defendant to vacate the said house and return the club membership to the plaintiff immediately. When the defendant refused to do so, the plaintiff commenced the present action seeking, *inter alia,* vacant possession of the said house and transfer of the club membership to the plaintiff.

The defendant's refusal was premised on the ground that the house and the club membership constituted a complete gift from the plaintiff. He counter-claimed for, *inter alia,* a declaration that he be declared as the beneficial owner of the property and an order that the plaintiff transfer the title of the property to his name.

Held:

[1] In determining the validity of the said gifts, in particular the said property, due regard ought to be had to s. 132E of the Companies Act 1965. Under the said section, a company or its holding company cannot transact with non-cash assets valued more than RM250,000, such as the property in the present suit, unless it is first approved by a resolution of the company in a general meeting, and where the director or connected persons is a director of its holding company, then by a resolution of the holding company in a general meeting. (pp 281 e & 282 b-e)

[2] Based on the facts, the provisions of s. 132E were applicable and must be complied with. Therefore, in absence of the said transaction falling under any exceptions to s. 132E, contained in s. 132F, any arrangement or transaction entered into would be voidable at the plaintiff's instance. (p 282 f-g)

[3] Regarding the club membership, valued at RM70,000, there was no evidence that a resolution or approval had been obtained to-date or to indicate that the membership had been given to the defendant as a gift. On a balance of probabilities, the plaintiff had established a claim for the said item against the defendant. (p 286 a-c)

[4] Where a gift rests merely in a promise, whether orally or in written form, or in an unfulfilled intention, it remained incomplete and imperfect, and the court will not compel the intending donor, being the plaintiff in the present matter, or those complaining under him to complete or perfect it. An incomplete gift can be revoked at any time, there being a power to draw back so long as the gift was incomplete. (p 286 f & g)

[5] The defendant's counter-claim involved the same issues as the plaintiff's claim. In absence of any evidence to support the counter-claim, it therefore must fail. (p 286 d)

[Plaintiff's claim allowed with costs; defendant's counter-claim dismissed with costs.]

Case(s) referred to:
Re Fry [1946] Ch 312 ***(refd)***
Re Lee Phee Soo, Decd [1960] 26 MLJ 234 ***(refd)***
Standing v. Bowring [1885] 32 Ch D 282 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 132E(1), 147(3), (6), 233(1)
Evidence Act 1950, s. 103

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, reissue, vol 20, p 42, para 63

For the plaintiff - R Vinayaga; M/s Skrine
For the defendant - Chan Kok Keong (Teoh Eng Keat); M/s Chan & Assocs

Reported by M Maheswaran

JUDGMENT

Ramly Ali J:

The plaintiff is a wholly-owned subsidiary of one Omega Holdings Berhad. The plaintiff is also the registered owner of land held under H.A.(D) 80069, P.T. No. 930 Kuala Lumpur, on which is constructed a 2-storey bungalow ('the property'). The defendant was a director of the plaintiff from 22 October 1991 to 3 October 1998 and was also a director of Omega Holdings Berhad from 8 March 1991 until 24 December 1997.

By virtue of the defendant's position as a director of the plaintiff, the defendant was provided with occupying by the plaintiff and the defendant has been accompanying the property since 1994. The plaintiff also provided the defendant with a membership at the Kelab Sultan Abdul Aziz Shah, which was registered in the defendant's name, to enable him to carry out his duties and functions as a director of the plaintiff and also for his personal use and enjoyment.

On 31 December 1997, the Board of Directors of the plaintiff resolved that an EGM of the plaintiff be convened on 9 January 1998 to consider passing a resolution to give the property and the Club Membership to the defendant as gratuities in consideration for his dedication and past services to the plaintiff. However, on 7 January 1998, ie, two days before the date fixed for the proposed EGM, the plaintiff's directors (including the defendant) resolved to postpone the EGM to a later date, pending the approval of the Kuala Lumpur Stock Exchange (KLSE) and the plaintiff's shareholders. To-date, the proposed EGM was never held and neither has the KLSE approved to the property or the Club Memberships being given to the defendant as gifts. To-date, there has been no execution of any instruments to transfer the property to the defendant. The property is still being registered in the plaintiff's name.

On 12 December 1998, the KLSE presented a petition for winding-up of the plaintiff. On 11 March 1999 the Shah Alam High Court appointed Abdul Jabbar bin Abdul Majid and Ab. Halim Mahyiddin as provisional liquidators of the plaintiff. Subsequent to their appointment, the provisional liquidators had, on behalf of the plaintiff, by way of a letter dated 26 March 1999 to

the defendant, requested that the defendant make the necessary arrangements to return the property and the Club Membership to the plaintiff immediately. The defendant failed and refused to deliver vacant possession of the property to the plaintiff. The defendant also failed and refused to give up the Club Membership back to the plaintiff.

The plaintiff then, on 5 October 1999, filed the present suit against the defendant claiming for the following:

(a) an order that the defendant do vacate and deliver vacant possession of the property to the plaintiff within 14 days from the date of the order;

(b) on order that the defendant do transfer his membership in Kelab Sultan Abdul Aziz Shah to the plaintiff within 14 days from the date of the order;

(c) damages to be assessed by the court;

(d) interest on (c) above at such rate and for such period of time as the court deems just and proper;

(e) costs; and

(f) such further or other orders as the court deems just and proper.

In his statement of defence, the defendant argued that there was a complete gift in respect of the property and the Club Membership from the plaintiff to the defendant based on the following reasons:

(1) The resolution of the board of directors of Omega Holdings Bhd (holding company) constitutes a resolution of a general meeting of the plaintiff as the plaintiff is a wholly-owned subsidiary of Omega Holdings Bhd. Thus, there was no necessity to convene an EGM of the plaintiff to approve the gifts when the same had been approved by the board of directors of Omega Holdings Bhd;

(2) There was no necessity for the plaintiff to seek the KLSE's approval for the gifts as the transaction did not involve a sale of the plaintiff's asset to the defendant; and

(3) As the defendant has resigned as a director of Omega Holdings Bhd. on 24 December 1997, the approval of the holding company (Omega Holdings Bhd) in a general meeting was not required for the transaction of the gifts which took place in 1998.

The defendant has also filed his counter-claim against the plaintiff for the following orders:

(1) A declaration that the defendant is the beneficial owner of the property;

(2) An order that the plaintiff do transfer and effect the registration of the property into the defendant's name on the title of the property within 30 days of the order;

(3) Damages;

(4) Interest at 8% p.a from date of judgment till final settlement;

(5) Costs;

(6) Such further or other relief which the court deems fit.

At the beginning of the hearing, the learned counsel for the plaintiff indicated to the court that he would be calling one witness for the plaintiff, and the learned counsel for the defendant has also indicated to call only one witness for the defence ie, the defendant personally. Both parties have filed their respective witness statements for the purpose of the hearing. The plaintiff did call one witness, and accordingly closed its case. After the close of the plaintiff's case, the learned counsel for the defendant informed the court that the defendant was not calling any witness (not even the defendant personally) but chose to submit on 'no case to answer'.

Issues To Be Decided

The following issues need to be decided by the court, namely:

(1) whether there was a valid and perfected gift of the property and the Club Membership from the plaintiff to the defendant;

(2) whether the transfer of the property and the Club Membership by the plaintiff to the defendant is subject to approval by a resolution of the plaintiff in a general meeting and also by a resolution of the holding company in a general meeting; and

(3) whether the transactions are within the ambit of s. 132E of the Companies Act 1965.

Court's Findings

The plaintiff's witness (PW1) is one Mr. Ong Hock An, a partner of KPMG. He was involved in the daily administrative duties involved in the matter and have full access to the documents of the plaintiff. He was duly authorised by the Provisional Liquidators to give evidence in court. A letter dated 8 November 2000 from Dato' Abd. Halim bin Mahyiddin, one of the appointed Provisional Liquidators confirms that. The said letter confirmed that Mr. Ong Hock An was appointed and authorised by him (Dato' Abd. Halim) to conduct,

carry out and assist in the administrative duties involved in the execution of his (Dato' Abd. Halim) duties as a Provisional Liquidator of the plaintiff company. The said letter also authorised Mr. Ong Hock An to have access to the documents regarding the same and has full knowledge of the facts involved. In his evidence, PW1 testified that he was involved in the liquidation exercise of the plaintiff right from day 1. In that exercise PW1 confirmed that he was working in a team. He personally had conducted investigations into the affairs of the plaintiff and gathered information from the books and records of the plaintiff. That being the case, the court is satisfied that Mr. Ong Hock An (PW1) is competent to be a witness on behalf of the Provisional Liquidator for the plaintiff in the present proceedings. He has the necessary knowledge relating to the affairs of the plaintiff for the purpose of this case.

The value of the property as stated in the circular resolution dated 31 December 1997 where the defendant was one of the signatories, was RM791,160 at that time (in 1997). This has not been challenged by the defendant. The transaction involved disposing of the property belonging to the plaintiff to the defendant, who at the material time was a director of the plaintiff. The defendant was a signatory to the circular resolutions of the board of directors of the plaintiff dated 31 December 1997 to convene an EGM on 9 January 1998. He was also a signatory to the other circular resolutions of the board of directors of the plaintiff dated 7 January 1998 to postpone the said EGM to a later date pending approval of the KLSE and the shareholders. In order to determine the validity of the said gifts, particularly the property in question, the court needs to consider whether the provisions of s. 132E of the Companies Act 1965 is applicable.

Section 132E(1) provides:

> (1) Subject to section 132F, a company shall not enter into any arrangement or transaction with a director of the company or its holding company or with a person connected with such a director to acquire from or dispose to such a director or person any non-cash assets of the requisite value unless the arrangement or transaction is first approved by a resolution of the company in general meeting and also, if the director or connected person is a director of its holding company or person connected with such a director, by a resolution of the holding company in general meeting.

In order to invoke the provisions of s. 132E of the Companies Act 1965, the following ingredients must be available:

i) the transaction is between the company and a director of the company or a director of its holding company or with a person connected with such director;

ii) the transaction involves an acquisition from or disposal of any non-cash assets between the company and the said director or connected person;

iii) the said non-cash assets involved must be of a requisite value ie, not less than RM10,000 but (subject to that) exceeds RM250,000 or 10% of the company's assets value (as defined under s. 132E(5) of the Act).

If all those ingredients are available, then the said transaction shall not be entered into by the company unless it is first approved by a resolution of the company in a general meeting and also, if the director or connected person is a director of its holding company, a resolution of the holding company in general meeting.

In the present case, at the material time, the defendant was a director of the plaintiff. This has not been disputed. The defendant was also a director of Omega Holdings Bhd (the holding company of the plaintiff), until 24 December 1997 when he resigned. The subject matter of the gift is a property known as 23, Jalan Derumun, Damansara Heights, Kuala Lumpur, held under H.S.(D) 800 69, No. P.T 930 Kuala Lumpur on which is constructed a 2-storey bungalow. It is a non-cash asset registered in the name of the plaintiff. The value of the said property (in 1997) was RM791,160 (which clearly exceeds RM250,000). Therefore, the provisions of s. 132E are applicable and must be complied with, before any arrangement or transaction can be entered into by the plaintiff and the defendant.

In other words, the approval of the company in a general meeting must first be obtained before the said arrangement or transaction can be effective and valid in law, unless the transaction comes under one of the exceptions provided under s. 132F of the same Act. In the present case, there is no indication to show that the said transaction comes under any one of those exceptions. Therefore, in the present case, since the proposed EGM which was scheduled on 9 January 1998 was postponed and there was no EGM held subsequent to that until to-date, the said transaction has clearly failed to comply with the requirement under s. 132E and therefore if the arrangement or transaction has been entered it is voidable at the instance of the plaintiff. The defendant personally was a signatory to both the circular resolutions of the board of directors of the plaintiff in this matter. He must be aware about the requirements under s. 132E. The circular resolution dated 7 January 1998 clearly indicated that the proposed EGM was postponed "pending the approval of the KLSE and shareholders" on the matter.

The Provisional Liquidators were appointed by an order of the High Court on 11 March 1999 and on 26 March 1999 (15 days later) the Provisional Liquidator issued a letter to the defendant requesting the defendant to make the necessary arrangements to return the property to the Provisional Liquidator immediately, under s. 233(1) of the Companies Act 1965. Section 233(1) of the Act clearly requires the Provisional Liquidator to take into his custody or under his control all the property and things in action to which the company is or appears to be entitled, once a Provisional Liquidator has been appointed. With this letter, it clearly indicates that the plaintiff, through the Provisional Liquidator has exercised its action to rescind the said voidable arrangement or transaction (if any) as provided under s. 132E(2). The court is satisfied that there was no undue delay in the action taken by the Provisional Liquidator. Therefore the question of delay as raised by the learned counsel for the defendant is untenable.

In the present case, the learned counsel for the defendant argued that there was an undue delay of "15 months" before the Provisional Liquidator sent a demand letter dated 26 March 1999 requesting the defendant to make the necessary arrangement to return the property immediately. By this argument, the learned counsel was trying to impress that there was an arrangement or transaction entered into between the plaintiff and the defendant whereby the said property was given to the defendant as a gift some time around the end of December 1997 or early January 1998. Again, the court is of the view that this argument is untenable and without merit at all. There was no evidence at all to show that the plaintiff or its holding (parent) company, Omega Holdings Bhd, either by way of general meeting or board of directors resolution had resolved that the property and the Club Membership be given to the defendant as gifts. It is for the defendant to prove that fact. Section 103 of the Evidence Act 1950 clearly provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In the present case there were only two circular resolutions produced for the purpose of the alleged gift ie, (i) circular resolution of the board of director of the plaintiff dated 31 December 1997 to convene an EGM on 9 November 1998; and (ii) circular resolution of the board of directors of the plaintiff dated 7 January 1998 to postpone the proposed EGM. The first circular resolution was meant "to consider and if deemed fit, to pass resolutions, *inter alia*, about the property and the Club Membership being given to the defendant in consideration for his dedication and past services rendered to the company between 10 September 1986 and 23 February 1997. The said circular resolution never at any time resolved that the property and the Club Membership be given to the defendant. It was just to convene an

EGM for the purpose of considering and if it deems fit, passing the proposed resolutions. Since the proposed EGM was postponed and not held until to date, then the only conclusion that can be drawn is that the plaintiff had never resolved either by way of board of directors' resolution or by way of general meeting about the said gifts to the defendant.

The learned counsel for the defendant contended that there was no necessity to convene an EGM of the plaintiff to approve the gifts or the transactions when the same had been approved by the board of directors of the holding company, Omega Holdings Bhd. He argued that the resolution of the board of directors of Omega Holdings Bhd constitutes a resolution of a general meeting of the plaintiff as the plaintiff is a wholly-owned subsidiary of Omega Holdings Bhd. To support his contention, the learned counsel for the defendant cited s. 147(6) of the Companies Act 1965 which reads:

> (6) Where a holding company is beneficially entitled to the whole of the issued shares of a subsidiary and a minute is signed by a representative of the holding company authorized pursuant to subsection (3) stating that any act, matter, or thing, or any ordinary or special resolution, required by this Act or by the memorandum or articles of the subsidiary to be made, performed, or passed by or at an ordinary general meeting or an extraordinary general meeting of the subsidiary has been made, performed, or passed, that act, matter, thing, or resolution shall, for all purposes, be deemed to have been duly made, performed, or passed by or at an ordinary general meeting, or as the case requires, by or at an extraordinary general of the subsidiary.

With respect, the court is of the view that the provision of s. 147(6) of the Companies Act 1965 is not applicable to the present case. In order to invoke s. 147(6), the defendant must show to the court that there is a minute signed by a representative of the holding company authorised pursuant to sub-s. (3) stating that the resolution required by s. 132E has been passed. There must be evidence advanced by the defendant to that effect. In the present case, there is no evidence at all to show who was the representative concerned and nothing to show the existence of the minute. There is also no evidence at all to show that the board of directors of Omega Holdings Bhd (the holding company) had resolved about the said gifts to the defendant. In fact the defendant had adduced no evidence at all to support his case. The defendant had chosen not to give evidence, and no other witnesses were called. There is not an iota of evidence to support the counsel's argument under s. 147(6).

No doubt the defendant in para. 3 of his statement of defence avers that "in 1998 the board of directors of Omega Holdings Berhad passed a resolution to give the property and the Club Membership ("the gifts") to the defendant

as gratuities in consideration for his dedication and past services rendered to the plaintiff'. However, the defendant has not adduced any evidence (oral or document) to prove this averment.

The defendant's counsel also argued that there was no necessity for the plaintiff to seek the KLSE's approval for the gifts as the transaction did not involve a sale of the plaintiff's asset to the defendant. With respect the court is of the view that this argument is actually without merit and cannot hold water. Whether the transaction requires the KLSE's approval or not is not really matter at this stage. What is more relevant here is that the said transaction did not comply with the requirements under s. 132E of the Companies Act 1965 ie, it was not first approved by the shareholders of the plaintiff in general meeting. That alone is sufficient to render the said transaction as voidable at the instance of the plaintiff if it has been entered into. The requirement under s. 132E must be fulfilled first notwithstanding the fact that the transaction was approved by the KLSE or there was no necessity for the plaintiff to seek the KLSE's approval. It is also surprising to note that the defendant, as one of the signatories to the circular resolution dated 7 January 1998 which resolved that the proposed EGM was "to be postponed to a later date pending the approval at the Kuala Lumpur Stock Exchange" is now submitting through his counsel that there was no necessity for such approval.

The learned counsel for the defendant has also argued that as the defendant had resigned as a director of Omega Holdings Berhad on 24 December 1997, the approval of the holding company (Omega Holdings Berhad) in a general meeting was not required for the transaction of the gifts which took place in 1998. The same averment was also contained in para. 7 of the defendant's statement of defence. The defendant also avers in the same para. 7 of his statement of defence, that the requirements under s. 132E have been complied with. Again the court is of the view that the above averment is without merit and therefore untenable. Section 132E(1) clearly provides that where an arrangement or transaction comes under the ambit of the section, it must first be approved by a resolution of the company itself (the plaintiff in the present case) because at that material time the defendant was a director of the plaintiff. In addition to that, if the defendant is also a director of the holding company (Omega Holdings Berhad), then the transaction must also be approved by the holding company in a general meeting. Even if the defendant had resigned his directorship in Omega Holdings Berhad (the holding company) on 24 December 1997, he was still required to obtain the prior approval of the plaintiff in a general meeting before entering into the alleged transaction. This has not been done until to-date.

With regards to the Club Membership, the value as stated in the Directors' Circular Resolution dated 31 December 1997, was RM70,000. This has not been disputed or challenged. The plaintiff had purchased the Club Membership for the defendant some time in July 1993. *Vide* the Directors' Circular Resolution of the plaintiff dated 31 December 1997, where the defendant was one of the signatories, it was resolved to convene an EGM for the purposes, *inter alia*, to consider and if deemed fit, to pass a resolution for approval to give the Sultan Abdul Aziz Shah Club Membership to the defendant as gratuity in consideration for his dedication and past services rendered to the plaintiff as a director since 22 October 1991. The proposed EGM was postponed. Therefore, the proposed resolution or approval was not obtained until to-date. There was also no other evidence or document to show that the said Club Membership was given to the defendant as a gift. The defendant has not come forward to give any evidence in court. Therefore, on the balance of probabilities, the court is satisfied that the plaintiff has also established its claim for the Club Membership against the defendant.

The defendant's counter claim actually touches on the same subject matter with the plaintiff's claim. Therefore, if the court allows the plaintiff's claim, then the defendant's counter-claim must fail. Furthermore, the defendant has failed to adduce any evidence in court to support his counter-claim. It is not disputed that both the property and the Club Membership were supposed to be considered as "gifts" from the plaintiff to the defendant. There may be an intention to that effect. But it was an unfulfilled intention as some of the legal requirements under s. 132E have not be complied with. Where a gift rests merely in promise, whether written or oral, or in an unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor (the plaintiff in the present case) or those claiming under him, to complete or perfect it. If a gift is to be valid, the donor (the plaintiff in the present case) must have done everything which, according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do. (see: *Halsbury's Laws of England*, 4th edn reissue, vol. 20, p. 42, para 63).

An incomplete gift can be revoked at any time; there is a power to draw back so long as the gift is incomplete, (see: *Standing v. Bowring* [1885] 32 Ch D 282 at p. 290 (A).

In *Re Fry* [1946] Ch. 312; [1946] 2 All ER 106 it was held that the intended gift was incomplete and therefore inoperative in that the donor had not done anything required of him in order to divest himself of the legal right and equitable title of the shares in question. That decision was followed by the Singapore Court of Appeal in *Re Lee Phee Soo, Deed.* [1960] 26 MLJ 234 (CA).

Applying the above principles to the facts of present case, it is clear that if at all the property and the Club Membership were meant to be given to the defendant as "gifts", then clearly they are incomplete and imperfect gifts. The court will not compel the plaintiff (as the intending donor) to complete and perfect them.

Under such circumstances, the defendant's counter-claim must be dismissed with costs.

Conclusion

Based on the above considerations, the court allows the plaintiff's claim against the defendant with costs. Damages (prayer (c) of the statement of claim) to be assessed by the SAR. The court also dismisses the defendant's counter-claim with costs.